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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LUKE NAPOLEON ESTRADA et al., Defendants and Appellants.	G041669 consol. w/ G042052 (Super. Ct. No. 08HF1969) O P I N I O N

Appeal from judgments of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Leonard J. Klaif, under appointment by the Court of Appeal, for Defendant and Appellant Luke Napoleon Estrada.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant Deandre Deshawn Bailey.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton, Sabrina Y. Lane-Erwin, Barry Carlton, Teresa Torreblanca, and Lynne McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Luke Napoleon Estrada and Deandre Deshawn Bailey[1] appeal from judgments after a jury convicted them of two counts of possession of controlled substances for sale. They contend the trial court erred by denying their motions to suppress evidence. (Pen. Code, § 1538.5.) Bailey also argues the trial court improperly admitted expert opinion testimony by a police officer that the drugs were possessed for sale. We reject their contentions and affirm the judgments.

FACTS

One Friday evening in 2008 around 11:00 p.m., several patrons at the District Lounge in Newport Beach complained to Anton Norac, the bar's security guard, about three men attempting to sell drugs inside the bar. Norac watched the three men approach one customer after another, for approximately 10 to 15 seconds at a time, although the customers shrugged them off or laughed. When Norac approached the men, they walked out of the bar. Estrada came back and asked for a hand stamp to re-enter, but Norac refused telling him "he knew why." In response, Estrada smirked and left. Shortly after the men left the area, Norac stopped Newport Police Officer Mario Montero and described what had just occurred. Montero forwarded the information to dispatch.

Newport Beach Police Officer Rowland Stucken testified at the suppression hearing and trial to the following facts. Around 11:30 p.m. that night he was patrolling in a marked patrol car when he received a radio broadcast about three men, two black and one white, who were attempting to sell drugs at the District Lounge and were last seen heading westbound on Balboa Boulevard. Not long after hearing the broadcast, Stucken saw three men (Estrada, Bailey, and a man later identified as "Zacarro") who matched the description given over the radio. The men were a short distance from the District Lounge and were facing westward on Balboa Boulevard. As Stucken made a U-turn, Zacarro walked away from Bailey and Estrada, went between two houses, and then returned to the group.

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[1] Bailey was originally charged as Datrall Lamonte Johnson, but ultimately the trial court determined his correct name is Deandre Deshawn Bailey.

Stucken pulled up next to where the three men were standing and got out of his car. His lights were not activated; his gun was not drawn. Stucken asked the men if he could speak with them, and they all said yes. Stucken asked the men in a casual tone to sit on the curb, and they complied with his request. Stucken noticed a strong aroma of marijuana coming from Bailey. He asked Bailey if he recently smoked marijuana, and Bailey responded he had. Stucken asked Zacarro why he walked between the houses and if he knew the occupants. Zacarro responded he was simply walking to the beach. Stucken asked the men for identification, which they provided. He held on to the identification cards and did not relay the information to dispatch. Stucken asked where the three men had been that night. Zacarro responded they had been to Cassidy Bar and other area bars the names of which he could not recall. Estrada and Bailey could not recall the names of the bars either, but agreed with Zacarro's statement.

When a back-up officer arrived, Stucken asked permission to pat down the three men and conduct a search for weapons or contraband. All three agreed to the search. Estrada had $654 in his wallet. Bailey had a small plastic bag containing 92 Flexeril pills, 27 Alprazolam (trade name "Xanax") pills wrapped in toilet paper, and $19 in his pockets. Bailey admitted he did not have a prescription to posses the pills and said he had purchased them earlier that day. The officers found 157 Alprazolam pills, 4 Clonazepam (trade name "Klonopin") pills, and 12 Carisoprodol (trade name "Soma") pills on Zacarro.

Newport Beach Police Officer Michael Fletcher, a canine handler, also testified at the suppression hearing and trial to the following. When Fletcher arrived on the scene with his drug-sniffing dog, he was told the men were suspected of selling drugs and possibly had a car in the area. Stucken gave Fletcher the keys, and he found the car, registered to Estrada, four blocks away. Fletcher's dog alerted on the car, indicating the presence of drugs inside. Before opening the car door, Fletcher saw three large commercial prescription bottles lying on the floorboard, two of which had Alprazolam labels. Officers opened the car and found pills and marijuana inside.

Shortly thereafter, officers brought Norac to the street corner where the men were located. Norac identified them as the men he saw at the bar.

At the hearing on Bailey's and Estrada's motions to suppress evidence, Stucken's and Fletcher's testimony mirrored the above stated facts. In denying the motions to suppress evidence, the trial court explained, "In looking at what—whether or not the individual search of the persons [was] consensual, I note the fact that there is no weapon, there [was] no touching, there [were] no handcuffs, there [was] no tone of voice, nothing to this court anyway to indicate that the conduct was so egregious it would vitiate any type of consent." The court went on to explain that when Stucken saw the individuals matching the description he had been given, he did "what any good officer would do, which is inquire further and investigate." Thereafter, "a number of things start building, which in the court's eyes justify the detention and probable cause to arrest, including initially smelling strong odor of marijuana" and Zacarro momentarily disappearing between the houses. In addition, the search of Estrada's car was proper because the pills were in plain view and the canine alerted on the car.

In addition to his testimony concerning the detention and search discussed above, at trial Stucken testified as to his opinion the drugs were possessed for sale. He testified the quantity and packaging of the drugs was consistent with the possession being with the intent to sell. Additionally, the amount of cash found on Estrada was consistent with selling drugs. Stucken explained it is not unusual for drug dealers working together to divide the responsibility for holding the money and holding the drugs so no one gets caught with both. Stucken testified Alprazolam (Xanax) is one of the "hottest" drugs being sold illegally in Newport Beach with side effects consistent with being drunk. He explained Clonazepam (Klonopin) is typically used by drug users of other illicit drugs to supplement other habits.

From Estrada's car, officers recovered approximately 678 tablets of Carisoprodol, 894 tablets of Clonazepam, and 129 tablets of Alprazolam. The street value

of carisoprodol ranges from $1 to $20 per tablet and the street value of clonazepam and alprazolam ranges from $5 to $20 per tablet. There were no names or personal identification information on any of the bottles.

Bailey and Estrada were each charged with two counts of violating Health and Safety Code section 11375, subdivision (b)(1)—one for possessing Clonazepam for sale and the other for possessing Alprazolam for sale. As to Bailey, the information alleged he had been on bail at the time of the alleged offense. (Pen. Code, § 12022.1, subd. (b).)

The jury found Bailey and Estrada guilty on both counts and found true the enhancement allegation as to Bailey. The trial court sentenced Bailey to a total term of five years, suspended execution of sentence, and placed him on three-years formal probation conditioned upon his serving six-months in jail, consecutive to a one-year jail term received in another case. The trial court placed Estrada on three-years formal probation following a one-year jail term.

DISCUSSION

1. Motions to Suppress

Estrada and Bailey contend the trial court violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution when it denied their motions to suppress. They contend the trial court's finding the encounter was consensual was not supported by substantial evidence, and Stucken did not have reasonable suspicion to detain them. We disagree.

In reviewing the ruling on the motions to suppress evidence, we defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 342.)

The relevant legal principles are laid out in *In re Manuel G.* (1997) 16 Cal.4th 805, 821: "Police contacts with individuals may be placed into three broad categories

ranging from the least to the most intrusive: consensual encounters that result in no restraint of liberty whatsoever; detentions, which are seizures of an individual that are strictly limited in duration, scope, and purpose; and formal arrests or comparable restraints on an individual's liberty. [Citations.] Our present inquiry concerns the distinction between consensual encounters and detentions. Consensual encounters do not trigger Fourth Amendment scrutiny. [Citation.] Unlike detentions, they require no articulable suspicion that the person has committed or is about to commit a crime. [Citation.] [¶] . . . [A] detention does not occur when a police officer merely approaches an individual on the street and asks a few questions. [Citation.] As long as a reasonable person would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required on the part of the officer. Only when the officer, by means of physical force or show of authority, in some manner restrains the individual's liberty, does a seizure occur. [Citations.] '[I]n order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.' [Citation.] This test assesses the coercive effect of police conduct as a whole, rather than emphasizing particular details of that conduct in isolation. [Citation.] Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer's display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer's request might be compelled. [Citations.] The officer's uncommunicated state of mind and the individual citizen's subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred. [Citation.]"

Estrada and Bailey contend their encounter with Stucken was not consensual at any point and, therefore, was a detention from the outset. We disagree. "An officer has every right to talk to anyone he encounters while regularly performing his duties . . . . Until

the officer asserts some restraint on the contact's freedom to move, no detention occurs. [Citations.]" (*People v. Castaneda* (1995) 35 Cal.App.4th 1222, 1227 (*Castaneda*).) The evidence is uncontroverted that when Stucken pulled up to where the three men were standing and asked to speak with them, all three men agreed to the request. There was no evidence Stucken used a hostile tone of voice. He did not activate his siren or lights, or draw his gun. There was no touching, and the men were not put in handcuffs. Stucken asked the men in a casual tone to sit on the curb, and they complied with his request. At this point, the encounter was entirely consensual.

Stucken next asked the men for their identification, and they complied. Although "a mere request for identification does *not* transmogrify a contact into a Fourth Amendment seizure[,]" (*People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1370 (*Cartwright*)), this court has held such an encounter may rise to the level of an investigatory detention once an officer obtains a person's identification because the person may not feel free to leave at that point. (*Castaneda, supra,* 35 Cal.App.4th at p. 1227 ["Although Castaneda was not restrained by the officer asking for identification, once Castaneda complied with his request and submitted his identification card to the officers, a reasonable person would not have felt free to leave"]; see also *U.S. v. Sanchez* (10th Cir. 1996) 89 F.3d 715, 718 ["Courts have identified several factors that could lead a reasonable innocent person to believe that he is not free to disregard the police officer, including . . . prolonged retention of a person's personal effects such as identification and plane or bus tickets"].) Here, after obtaining the men's identification, and after back up officers had arrived, Stucken asked the men for permission to conduct a pat down search for weapons or contraband. At this point, a reasonable person in their position would not have felt free to leave, and the encounter became a detention.

An investigatory detention is not unlawful if supported by a reasonable suspicion the person being detained is or has been involved in some criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 22.) "Reasonable suspicion is a lesser standard than

probable cause, and can arise from less reliable information than required for probable cause, including an anonymous tip. [Citation.]" (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.) "[W]here a reasonable suspicion of criminal activity exists, 'the public rightfully expects a police officer to inquire into such circumstances, "in the proper exercise of the officer's duties." [Citation.]' [Citation.]" (*Ibid.*) In making our determination, we examine the totality of the circumstances as known to Stucken at the time of the incident. (*Ibid.*)

Stucken had reasonable suspicion to detain the men. Estrada and Bailey contend Stucken did not have "specific and articulable facts" to support the belief they were involved in criminal activity, and he merely relied on a race description. This argument is without merit. Race was not the sole factor that motivated Stucken to approach the men. Shortly after receiving the broadcast message, Stucken noticed three men in the area of the reported incident facing westbound, as the broadcast described, and the race of the three men matched the race of the described suspects in the radio broadcast. After approaching the men, Stucken noticed a strong aroma of marijuana emanating from Bailey. The strong odor of marijuana gave Stucken probable cause to search the men. "The 'strong aroma of fresh marijuana' can establish probable cause to believe contraband is present. [Citation.]" (*People v. Benjamin* (1999) 77 Cal.App.4th 264, 273.)

Further, as Stucken made a U-turn, he noticed Zacarro walked away from Estrada and Bailey, go between two houses, and then return to the group. Activities that in isolation may seem innocuous, in proper context, can indicate criminal activity to an officer with special training and experience. (*People v. Carvajal* (1988) 202 Cal.App.3d 487, 496.) "Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens." (*People v. Cowman* (1963) 223 Cal.App.2d 109, 117.) "The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct." (*In re Tony C.* (1978) 21 Cal.3d 888, 894.) In short, Estrada and Bailey offer no compelling reason to overrule the trial court's

denial of their motions to suppress and there was no violation of their Fourth or Fourteenth Amendment rights.

2. Expert Testimony

Bailey separately contends Stucken was not qualified to render the opinion the drugs were possessed for sale, as opposed to personal use, and, therefore, the trial court abused its discretion in admitting the testimony. Again, we disagree.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) An expert is qualified if he "has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth . . . ." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 38.) The trial court's determination whether a witness qualifies as an expert is subject to review for abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.) "[An] abuse of discretion will be found only where '"the evidence shows the witness *clearly lacks* qualification as an expert . . . ."' [Citations.]" (*People v. Chavez* (1985) 39 Cal.3d 823, 828.)

In response to prosecution questions, Stucken testified the drugs in Estrada's car were possessed for the purpose of sales. Stucken explained the pharmaceutical bottles found in the car were of the type "used to fill prescriptions from a pharmacy, not given by a doctor to a patient to treat an illness." Stucken testified the quantity of pills was "much more than what someone would use for personal use, consistent with a quantity for someone intending to sell." Stucken further based his opinion the drugs were possessed for sale on the amount of money found on Estrada and his presence with Bailey and Zacarro who were in possession of drugs. Stucken explained typically the money and pills are "separated between individuals who are working in concert and cohorts together to sell narcotics, for purposes if one is stopped by the police, and he is not at least with both the pills and the money." The trial court overruled Bailey's objections to this testimony.

After the defense rested, Bailey moved to strike Stucken's opinion the drugs were possessed for purposes of sale. Bailey argued Stucken did not have expertise regarding the lawful use of the drugs and, therefore, could not testify they were possessed for purposes of sale. The trial court denied the motion, explaining there was no evidence any of the men had prescriptions for the drugs. Therefore, Stucken's lack of knowledge of their lawful use was "minimized in its importance."

It cannot be said Stucken clearly lacked the requisite qualifications to testify as an expert. He had been a sworn officer for a year and a half, attended a six-month police training academy, received approximately 24 hours of training in the area of "narcotics and investigation," and had "countless hours" of training with field training officers. Moreover, he had participated in more than one hundred narcotics investigations. About 10 or 15 of those investigations involved prescription medications. Two or three dealt with the possession of prescription pills for sale. Stucken spoke with senior narcotics officers, users and sellers of narcotics, and pharmacists. Based upon Stucken's training and experience, the trial court's finding he was qualified to testify the drugs at issue were possessed for purposes of sales was not an abuse of discretion.

Bailey's reliance on *People v. Chakos* (2007) 158 Cal.App.4th 357, is misplaced. In *Chakos*, this court held expertise in possession of illegal drugs for sale did not qualify the witness in determining whether the marijuana was possessed illegally for sale or for legal medicinal purposes. (*Id.* at pp. 365, 367-368.) However, in this case there is no evidence Bailey or his companions had a prescription to posses the pills. Stucken did not testify on whether the drugs were possessed legally but whether this illegal possession was for personal use or sale. Stucken's training and experience qualified him to testify on this matter, and the trial court did not abuse its discretion in allowing his testimony.

Even if Stucken's opinion the drugs were possessed for purposes of sale had been stricken, it is not reasonably probable the result of the trial would have been more favorable to Bailey. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence the drugs

were possessed for sale was overwhelming. Bailey and his cohorts had just been kicked out of a bar for attempting to sell drugs. The men had close to two-thousand pills in their joint possession for which they did not have prescriptions. Stucken testified Alprazolam is one of the hottest street drugs being sold illegally in the city and Clonazepam is typically used by drug users of other illicit drugs to supplement their habits. Some of the drugs were in small baggies and some were wrapped in toilet paper. The drugs in Estrada's car were in commercial-size pharmaceutical bottles, which did not have any names or personal identification information on them.

Bailey asserts the error was not harmless because during deliberations, the jury asked the court whether it "must find unanimously as to what was described as the 'possession with intent theory.'" He argues this question indicates the jury "was considering the issue of intent carefully" and Stucken's expert testimony most likely "tipped the balance" of the jury's reasonable doubt on the intent issue. We note by selectively referencing the jury's question, Bailey has misrepresented what actually transpired below and the real nature of the jury's inquiry.

At trial, the jury was instructed on two possible theories of guilt: uncharged conspiracy to sell a controlled substance and joint possession of a controlled substance for sale (with simple possession as a lesser included offense). The verdict forms submitted to the jury only gave it the option of making a finding of guilty or not guilty on the charged offenses.

During deliberations the jury asked in writing for "advice from [the court] as to whether or not the jury must find separately or unanimously as to the conspiracy 'theory' and/or the possession with intent 'theory.'" When the court responded the question was unclear, the jury rephrased the question: "The verdict form does not specify a theory on which a decision is made. . . . [Must the jury] choose or vote (i.e., conspiracy or joint possession with intent to sell) or both. [Please] advise—do we need to choose?" To this question, the court replied jury agreement on the theory was not required. (See *People v.*

Napoles (2002) 104 Cal.App.4th 108, 118 [law well established jurors not required to agree on specific theory of guilt].) The court, however, did instruct the jury it must unanimously agree as to the act that constituted the crime because drugs were found in three places—Bailey's pockets, Zaccaro's pockets, and in the car. When read in context, we are left with no doubt the jury question does not suggest it was struggling with whether it had to agree unanimously on the facts—i.e., that the drugs were possessed with the intent to sell. It was only asking if it had to agree on the theory of guilt. And given the overwhelming evidence already detailed, we are satisfied it is not reasonably probable that absent Stucken's expert testimony the jury would have concluded the drugs were possessed for personal use.

DISPOSITION

The judgments are affirmed.

O'LEARY, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.